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Supreme Court, U.S.
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NO. 97-1262

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON,

Petitioner,

v.

STEVIE LAMAR FIELDS,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Pursuant to Rule 39 of the Rules of the United States Supreme Court, the respondent, Stevie Lamar Fields, requests leave to proceed in this matter in forma pauperis and to file the accompanying brief in opposition to the petition for writ of certiorari without payment of costs. Mr. Fields is indigent and presently housed on California's death row at San Quentin State Prison. The undersigned counsel were appointed to represent Mr. Fields in July, 1992, in his federal habeas corpus proceedings initiated under 28 U.S.C. § 2254,

pursuant to 18 U.S.C. § 3006(A) and Local Rule 26.8.4(a) of the Local Rules for the United States District Court of the Central District of California.

Mr. Fields previously was granted permission to proceed in forma pauperis in California state appellate and habeas corpus proceedings regarding his conviction of murder and resulting death sentence, and similarly was granted permission to proceed in forma pauperis in his federal habeas corpus proceedings relating thereto in the United States District Court for the Central District of California and in the United States Court of Appeals for the Ninth Circuit.

Dated: April 9, 1998

Respectfully Submitted,

CARLSMITH BALL

By: _____

David S. Olson
Attorneys for Respondent
Stevie Lamar Fields

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED

Was California's procedural default "Dixon rule" for failure to raise a claim on appeal adequate as of the time of Fields's appeal in 1981 so as to bar federal review of habeas corpus claims procedurally defaulted under such rule?

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 125 F.3d 757 (9th Cir. 1997) and attached as Appendix A to the petition for writ of certiorari. The United States District Court opinion is not published and is attached as Appendix B to the petition.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Stevie Lamar Fields ("Fields") was convicted of murder and sentenced to death in the Superior Court of California, County of Los Angeles, in 1979. This action involves his federal petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254.

STATEMENT OF THE CASE

Fields's conviction and death sentence were upheld on appeal by the California Supreme Court. People v. Fields, 35 Cal.3d 329, 197 Cal. Rptr. 803, 673 P.2d 680 (1983), cert. den., 469 U.S. 892 (1984). Fields then filed a petition for a writ of habeas corpus in the California Supreme Court on December 4, 1984, which petition was amended on August 26, 1985 (the "Initial State Habeas Petition"). The California Supreme Court denied the Initial State Habeas Petition. In re Fields, 51 Cal.3d 1063, 275 Cal. Rptr. 384, 800 P.2d 862 (1990), cert. den., 502 U.S. 845 (1991).

On May 25, 1993, Fields filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California ("District Court") and then filed an amended petition in the District Court on August 2, 1993.

The petitioner herein, Arthur Calderon ("Calderon"), filed a motion to dismiss the amended habeas petition. In ruling on that motion, the District Court found certain claims in the amended habeas petition to be unexhausted, and provided Fields with an opportunity to present the unexhausted claims to the California Supreme Court. Fields thus filed a second petition for writ of habeas corpus in the California Supreme Court on January 14, 1994 (the "Exhaustion Petition"). The California Supreme Court denied the Exhaustion Petition by its order of October 14, 1994, which is attached as Appendix C to Calderon's subject petition for writ of certiorari (the "Petition"). As pertinent herein, that order provides:

> "The following claims are denied on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas petition: the claims set forth in parts IX(A, B, E, F, G), X(B, C, F, G, H, b, XV, XVIII, XXI (as to the claim relating to the instruction on suppression of evidence), XXIII, XXIV, XXV, XXVI, XXX, XXI. (In re Harris (1993) 5 Cal. 4th 813, 829; In re Dixon (1953) 41 Cal. 2d 756, 759.)"[1]

Pursuant to the order of the District Court, Fields filed his second

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[1] In In re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953), the California Supreme Court held that "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances . . . the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal." Similarly, in In re Harris, 5 Cal. 4th 813, 829, 855 P.2d 391 (1993), the California Supreme Court stated, "an unjustified failure to present an issue on appeal will generally preclude its consideration in a postconviction petition for a writ of habeas corpus." Thus, the citations to Dixon and Harris only reference California's default for failure to raise a claim on appeal (hereinafter "the Dixon default" or "the Dixon rule").

amended petition for writ of habeas corpus in the District Court on March 21, 1995 (the "Second Amended Petition"). On July 31, 1995, Calderon filed a "Motion to Dismiss Claims Barred by State Procedural Default in Second Amended Petition for Writ of Habeas Corpus" (the "Motion to Dismiss"), contending that various of the claims asserted by Fields in the Second Amended Petition are barred from federal review because they were procedurally defaulted by the California Supreme Court's October, 1994 order. Fields opposed the Motion to Dismiss, contending, among other things, that the procedural rules invoked by the California Supreme Court are not adequate and independent so as to bar federal review of the defaulted claims.

The District Court, by its order entered June 12, 1996, granted the Motion to Dismiss and dismissed all or part of eleven of the claims alleged by Fields in the Second Amended Petition, holding that "at the time [Fields] defaulted on his state court claims, the Dixon rule was regularly and consistently applied." Petn., App. B, p. 6. The District Court also ordered the parties to brief issues relating to cause and prejudice as to the default, and whether a fundamental miscarriage of justice would result by a failure to consider the defaulted claims. Id. at 8.

On June 27, 1996, Fields filed in the District Court a "Motion for Reconsideration of Court's Order of June 12, 1996 or, in the Alternative, for Certification of Such Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a)." The District Court, by its order entered July 30, 1996, denied Fields's Motion for Reconsideration, but granted the motion for certification of the June order for interlocutory appeal, and also stayed further proceedings at the District Court level.

The Ninth Circuit granted Fields permission to file an interlocutory appeal. After briefing and oral argument, the Ninth Circuit, in Fields v. Calderon, 125 F.3d 757 (9th Cir. 1997) ("Fields"), a unanimous opinion authored by Judge Thomas G. Nelson, held that California's Dixon rule was not adequate as of 1981 so as to bar federal review of claims defaulted under that rule. The Ninth Circuit did not address Fields's other contentions on appeal: that the District Court erred in granting the Motion to Dismiss without analyzing whether the Dixon rule is independent of federal law, and that the California Supreme Court's October 1994 order is too ambiguous to bar federal review of the defaulted claims. Fields, supra, 125 F.3d at 760, n.3. As such, the Fields holding is very narrow and the decision may affect only those California inmates who are seeking federal habeas corpus review of claims defaulted by the Dixon rule.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED UNDER RULE 10

Rule 10 of the Rules of the Supreme Court of the United States (the "Rules") sets forth various applicable factors regarding certiorari petitions, although neither controlling nor fully measuring the court's discretion. Calderon ignores Rule 10 because none of the factors favor this Court exercising jurisdiction in the instant case.

For example, the Fields decision does not conflict with any other United States Court of Appeals decision. (Rule 10(a).) As noted in Fields, the question of the adequacy of the Dixon default was one of first impression. Fields, supra, 125 F.3d at 761.[2]

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[2] In Calderon v. U.S. Dist. Ct. for the E.D. of Cal. (Hayes), 103 F.3d 72, 75 (9th Cir. 1996), cert. den., ___ U.S. ___, 117 S.Ct. 2532 (1997), the Ninth Circuit denied a mandamus (continued...)

Fields does not conflict with any decision by a state court of last resort. (Rule 10(a).) The California Supreme Court cannot directly decide whether the Dixon rule is adequate and independent so as to bar federal review of claims defaulted thereunder. See, e.g., Johnson v. Mississippi, 486 U.S. 578, 587 (1988). Nonetheless, recent observations by the California Supreme Court on the issue of the consistent application of California's procedural default rules fully comport with Fields. In re Clark, 5 Cal. 4th 750, 768, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993) (noting that California's rule against successive habeas petitions has been termed "discretionary" and is "subject to undefined exceptions"); In re Harris, supra, 5 Cal. 4th at 828-34 (noting that California's application of its procedural default rules had become obscured over the years and suggesting that it would more stringently apply the rules in the future).[3]

The Ninth Circuit in Fields did not depart "from the accepted and usual course of judicial proceedings." (Rule 10(a).) Finally, the narrow Fields decision did not decide an

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[2](...continued)
petition seeking to overturn a district court's order that the Dixon rule was not adequate and independent so as to bar federal review. Fields is also consistent with prior Ninth Circuit decisions holding that other California procedural default rules are not adequate to bar federal review. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert. den., 513 U.S. 1183 (1995) (California's rule against successive habeas petitions is not adequate and independent so as to bar federal review of claims defaulted under that rule); Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir. 1996), cert. den., ___ U.S. ___, 117 S.Ct. 500 (1996) (California's timeliness rules as to filing of habeas petitions are not adequate and independent so as to bar federal review).

[3] Calderon, in all his briefing below, strenuously urged that this case presented a "post-Clark" scenario but now contends that in Clark and Harris "the California Supreme Court was, at most, merely restating its longstanding default rules" (Petn. at 16) even while conceding at other times that the California Supreme Court deemed it necessary in Clark and Harris to "clarif[y] (and strengthen) existing California procedural default law." Petn. at 3.

important question of federal law that has not been, but should be, settled by this Court, nor does it involve an important federal question that conflicts with relevant decisions of this Court. (Rule 10(c).) In fact, Fields is based entirely upon precedent from this Court. For example, the Ninth Circuit relied upon three United States Supreme Court cases (Ford v. Georgia, 498 U.S. 411 (1991), James v. Kentucky, 466 U.S. 341 (1984), and NAACP v. Alabama ex. rel. Pattersen, 357 U.S. 449 (1958)) in confirming that the proper date on which to evaluate the adequacy of a procedural default rule is when the claim should have been raised. Fields, supra, 125 F.3d at 760. The Ninth Circuit also relied upon three United States Supreme Court cases in analyzing the adequacy of the Dixon rule (Coleman v. Thompson, 501 U.S. 722 (1991), Ford v. Georgia, supra, and Johnson v. Mississippi, supra). Fields, supra, 125 F.3d at 762-65.

In short, the factors set forth in Rule 10 demonstrate that there is no reason for this Court to grant the Petition. Moreover, as shown below, Calderon fails to set forth any other reason why the Petition should be granted.

II. SUMMARY OF ARGUMENT

Calderon does not and cannot contend that California's so-called Dixon rule was consistently applied in 1981 when Fields completed his briefing on appeal. Instead, he tries to rewrite both well-established federal law on procedural default and the Fields decision. For example, Calderon contends that the adequacy of the Dixon rule should be evaluated as of the time the default is subsequently invoked (here, in 1994), as opposed to when the default actually occurred (here, in 1981). Petn. at pp. 13-15. The Ninth Circuit, however, correctly rejected this contention. Following clear precedent from this Court, the Ninth Circuit

reiterated that the "relevant point of reference" for assessing the adequacy of a procedural default rule is when the litigant fails to comply with the rule, i.e., defaults under the rule, not the time when the default is subsequently invoked. Fields, supra, 35 F.3d at 760-61.

Second, to be adequate to bar federal review, a state procedural rule must be (1) clear, (2) firmly established, **and** (3) regularly followed at the time of the litigant's default. E.g., Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965); Ford v. Georgia, supra, 498 U.S. at 423-24. The Ninth Circuit correctly held that the Dixon rule was not regularly followed in 1981. Fields, supra, 125 F.2d at 764-65. Calderon thus misses the point when he contends in response that because Dixon was **decided in 1953** the Dixon rule was thus "well-established" by 1981 and Fields was "on notice" of the rule in 1981 and had "a reasonable opportunity" to raise his claims then. E.g., Petn. at 13-15, 22-26. This contention ignores that it is not enough that the rule is an old one; a state procedural default rule must be consistently applied, however old it may be, to be adequate to bar federal review.

Finally, Calderon, in an apparent attempt to distract this Court from the simple issue decided in Fields, that opinion's narrow holding, and the propriety of that decision, resorts to numerous unfounded and extraneous attacks on the Ninth Circuit, for instance, accusing it of systematically dismantling California's procedural bars (Petn. at 7), and engaging in "mischief." Id. at 11. In this vein, Calderon contends the Ninth Circuit undertook a "predictably . . . seriously flawed" analysis of the application of the Dixon rule. Petn. at 22. Pejoratives aside, the Ninth Circuit engaged in a simple and sound analysis. In deciding whether California consistently applied the Dixon default as of 1981, the Ninth Circuit looked to the California cases. There, it saw that the California courts themselves repeatedly

acknowledged the discretionary nature of the Dixon rule, and also that they did not regularly apply it during the relevant time period. When the California courts state again and again that the so-called Dixon rule is only a discretionary policy, and acknowledge that the Dixon rule and other procedural default rules were not consistently applied during the relevant time period, then the Ninth Circuit should not be disparaged for following the mandates of federal procedural default law, including those laid down by this Court, and correctly holding that such a "rule" is not adequate to bar federal review.

III. ARGUMENT

A. A State's Procedural Default Rule Must be Adequate and Independent to Bar Federal Review

Federal courts are obligated to hear federal claims presented by a habeas corpus petition unless a prior state court decision denied relief relying upon a state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, supra; Harris v. Reed, 489 U.S. 255, 260-62 (1989). To be independent of federal law, a state procedural rule must not depend "upon an antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, the state procedural rule must be clear (Henry v. Mississippi, supra, 379 U.S. at 448 n.3), and "firmly established" and "regularly followed." James v. Kentucky, supra, 466 U.S. at 348-51.

A rule is "regularly followed" if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989). It is thus not enough that the procedural rule be firmly established if it is not also regularly followed—i.e., applied in the vast majority of cases. James v. Kentucky, supra, 466 U.S. at 348-49; Barr v. City of Columbia, 378 U.S. 146,

149 (1964) (procedural rule not adequate unless it is strictly or regularly followed); Siripongs, supra, 35 F.3d at 1318 ("federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce").

A state procedural rule that is discretionary is inadequate to bar federal review. Williams v. Georgia, 349 U.S. 375, 389 (1955); Harmon v. Ryan, supra, 959 F.2d at 1461. Further, where a state court has failed to articulate the parameters within which it will exercise discretion to waive compliance with a procedural rule, the rule is not adequate. Gutierrez v. Moriarty, 922 F.2d 1464, 1470-71 (10th Cir. 1991), cert. den., 502 U.S. 844 (1991).[4]

B. The Default in this Case Occurred in 1981

Calderon, apparently recognizing the futility of attempting to establish the consistent application of the Dixon default as of 1981, instead argued below that the "trigger date" for the analysis should be 1994, when the California Supreme Court invoked the Dixon default in denying claims asserted in Fields's Exhaustion Petition. The Ninth Circuit, however, analyzed this issue in accordance with clear precedent from this Court and properly concluded that the "relevant point of reference for assessing" the adequacy of the Dixon rule is 1981, when the default occurred. Fields, supra, 125 F.3d at 760-61.

Calderon renews his contention in the Petition, asserting that "the proper trigger date for a consistency-of-application evaluation is 1994, the date when the California

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[4] Even where the state court decision is supported by an independent and adequate state ground, the federal court may still consider the claim if the petition demonstrates cause for the default and actual prejudice resulting from the alleged violation of federal law, or a fundamental miscarriage of justice. Harris v. Reed, supra, 489 U.S. at 262.

Supreme Court actually applied the Dixon rule and denied 11 claims contained in Fields's final state habeas corpus petition on procedural grounds." Petn. at 14. Calderon, however, does not, and cannot, cite a single case to support this contention. Instead, as the Ninth Circuit in Fields noted, fairness and clear precedent from this Court require that the adequacy of a procedural default rule be determined as of the time the underlying default occurred:

> "The Supreme Court of the United States has made it clear that a state's procedural rule used to bar consideration of a claim 'must have been "firmly established and regularly followed" by the time as of which it is to be applied.' [Citations to Ford v. Georgia, supra, 498 U.S. at 424, and James v. Kentucky, supra, 466 U.S. at 348.] In NAACP v. Alabama ex rel. Patterson, [supra, 357 U.S. at 457,] the Court refused to apply a state's procedural rule, because the defendant there could not be 'deemed to have been apprised of its existence.' In Ford, the Supreme Court said that applying the rule to Ford would 'apply a rule unannounced at the time of [Ford's] trial . . . .' Ford, 498 U.S. at 424, 111 S. Ct. at 857.
>
> . . . .
>
> Therefore, we examine whether the state courts were regularly and consistently applying the relevant procedural default rule 'at the time the claim should have been raised.' [Citation omitted.]
>
> With respect to the Dixon rule, we have held that a relevant point of reference for assessing its application is the time at which the petitioner 'had an opportunity to raise the claims on direct appeal.' [Citations omitted]. Because the Dixon rule precludes collateral review of a claim that could have been brought on direct appeal, the procedural default, though announced by the California Supreme Court when the habeas petition is denied, technically occurs at the moment the direct appeal did not include those claims that should have been

> included for review. In this case, that moment is 1981, the year of Fields' direct appeal." Fields, supra, 125 F.3d at 760-61.[5]

In Ford v. Georgia, supra, the Supreme Court of Georgia had procedurally defaulted a claim under Batson v. Kentucky, 476 U.S. 79 (1986), based on a state rule requiring such claims to be raised between the jurors' selection and their oath. The question in Ford v. Georgia was whether such rule was adequate and independent to preclude federal review of the Batson claim. Ford v. Georgia, supra, 498 U.S. at 418.

This Court noted that the Batson decision issued while the petitioner's first petition for writ of certiorari was pending before it (id. at 417), and that the state procedural rule requiring a Batson claim to be raised contemporaneously as the jury was selected was announced in State v. Sparks, 257 Ga. 97, 98, 355 S.E. 2d 658, 659 (1987), a year later. Ford v. Georgia, supra, 498 U.S. at 417-18.

This Court thus held that the Supreme Court of Georgia erred in ruling that the Sparks rule precluded consideration of the petitioner's Batson claim, stating:

> "The Supreme Court of Georgia's application of its decision in Sparks to this case before us does not even remotely satisfy the requirement of James [v. Kentucky, supra] that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been "firmly established and regularly followed" **by the time as of which it is to be applied**. **At the time of petitioner's trial**, Georgia's procedural law was just what it was when the Sparks defendant was tried . . . .

---

[5] Calderon contends that the Ninth Circuit "patently confuse[ed] firm establishment with regularity of application," and thus "erroneously concluded that California's allegedly irregular application deprived Fields of notice." Petn. at 13. As above shown, this misstates the Ninth Circuit analysis. The Ninth Circuit simply noted that the requirement that the procedural default rule be adequate as of the time of the underlying default avoids the unfairness of applying a new rule retroactively and also gives the defendant and his counsel notice that the claims must be raised at that time. Fields, supra, 125 F.3d at 761.

> To apply Sparks retroactively to bar consideration of a claim not raised between the jurors' selection and oath would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground within the meaning of James. . . . **Since the rule was not firmly established at the time in question**, there is no need to dwell on the further point that the state court's inconsistent application of the rule in petitioner's case and Sparks would also fail the second James requirement that the state practice have been regularly followed." Id. at 424-25 (emphasis added).

This Court, in Ford v. Georgia, thus clearly held that the time "as of which" the procedural bar "is to be applied" means the time when the underlying default occurred, for example, in the Ford v. Georgia case, "at the time of petitioner's trial," or here, when Fields failed to raise claims in his 1981 appeal. Calderon's contention that the procedural default here "was applied" in 1994 is thus erroneous and contrary to Ford v. Georgia.[6] Moreover, use of the 1994 date in this case, as Calderon urges, would condone a retroactive application of a state procedural rule to bar claims, a practice this Court strongly condemned in Ford v. Georgia. See also, NAACP v. Alabama, supra, 357 U.S. at 457 (state procedural rule of which petitioner was not apprised as of the time of seeking relief in the state court was not adequate and independent to bar federal review, even where it might appear "in retrospect" that the rule was consistently applied, because, based on prior state court opinions, the petitioner "could not fairly be deemed to have been apprised of its existence").

The adequacy of a state's procedural default rule must thus be determined as of the time the purported default occurred. The Ninth Circuit analysis in this regard was proper.

---

[6] Calderon's reliance on Ford v. Georgia is misplaced because he simply assumes, incorrectly and contrary to that opinion, that the "time as of which" a procedural default is to be "applied" relates to the subsequent invocation of a procedural default. Petn. at 14.

Caldron's further contention that the Ninth Circuit position regarding this issue has changed or evolved from prior decisions (Petn. at 7-8, 15) is thus not relevant to determining the propriety of the instant Fields decision. Moreover, Calderon is in any event mistaken on this latter point as Morales v. Calderon, supra, and Siripongs v. Calderon, supra, do not support Calderon's contention that the "trigger" date for determining the adequacy of a procedural default is when the procedural rule is invoked, as Calderon suggests. Petn. at 7-8.

In Morales, the Ninth Circuit expressly noted that Clark was decided after all relevant events there had transpired, and also held that California's timeliness rules were not clear, consistently applied, and well-established **at any time** after Morales's convictions were affirmed (in 1989) and before he filed **his first** state habeas petition (in 1992). Morales v. Calderon, supra, 85 F.3d at 1393. In Siripongs, the Ninth Circuit also expressly noted that Clark was decided after all relevant events had transpired in Siripongs, so again there was no issue as to Clark's application. Siripongs v. Calderon, supra, 35 F.3d at 1318.[7]

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[7] As Calderon concedes, the analysis in Fields is in fact consistent with the analysis used by the Ninth Circuit in Calderon v. United States District Court for the E.D. of California (Bean), 96 F.3d 1126, 1130 (9th Cir. 1996), cert. den., ___ U.S. ___, 117 S.Ct. 1569 (1997), wherein the Ninth Circuit held that while the habeas petition in Bean leading to the procedural default order was filed in early 1994, after the Clark decision, there was "no dispute" that "the default [for untimeliness in Bean], if any, would have occurred before Clark was decided" because Bean's direct appeal was decided in 1988, and Hayes, supra, 103 F.3d at 72, wherein the Ninth Circuit rejected the respondent's argument that "even if Dixon was not consistently applied before Harris, it is fair to apply the Dixon bar to Hayes because Harris put Hayes on notice that he must justify any failure to raise claims on appeal or lose the ability to raise them on habeas review," stating: "Hayes' direct appeal ended before Harris was decided. Hayes had no notice that the Dixon bar would be consistently enforced **when he had an opportunity to raise the claims on direct appeal, the time at which the alleged default occurred**." Id. at 75 (emphasis added).

C. The Dixon Rule Was Not Regularly Applied as of 1981

Fields cited below myriad California cases to show that the California courts repeatedly referred to the Dixon rule as a discretionary policy and did not consistently apply the rule as of 1981. E.g., In re Wallace, 3 Cal. 3d 289, 292-93, 90 Cal. Rptr. 176 (1970) (quoting In re Black, 66 Cal. 2d 881, 887, 59 Cal. Rptr. 429 (1967) for the proposition that the Dixon rule is "merely a discretionary policy" and thus reaching the merits of habeas claims not fully exhausted on appeal); In re Coughlin, 16 Cal. 3d 52, 55, 127 Cal. Rptr. 337 (1976) (the "general rule" that habeas cannot serve as a second appeal "is primarily a discretionary policy which may be overlooked where 'special circumstances' are deemed to exist"); In re Antazo, 3 Cal. 3d 100, 107, 89 Cal. Rptr. 255 (1970) ("'exhaustion of the appellate . . . remedy . . . is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue'" a habeas corpus writ (citations omitted)); In re Clark, supra, 5 Cal. 4th 750, 768 (California's procedural default rules have been termed "discretionary" and are "subject to undefined exceptions"); In re Harris, supra, 5 Cal. 4th at 828-34 (California's procedural default rules became obscured over the years and are subject to a "number of exceptions," including "a wide-ranging 'fundamental constitutional rights' exception").[8]

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[8] Fields also contended that the Dixon rule was not adequate to bar federal review because the Dixon rule has never been clearly defined. The rule prohibits a petitioner from raising claims in habeas in the first instance where such claims could have been raised on appeal "in the absence of special circumstances." In re Dixon, supra, 41 Cal. 2d at 759. The California Supreme Court has never explained what "the special circumstances" might be, and recently declined to "clarify and limit the exceptions to" the Dixon rule. In re Clark, supra, 5 Cal. 4th at 768 n.8.

In discussing the California Supreme Court's decisions in In re Clark, supra, and In re Harris, supra, the Ninth Circuit stated:

> "The California Supreme Court could hardly have stated more clearly that the application of its procedural rules governing habeas petitions had become irregular and inconsistent. The opinions in In Re Clark and In Re Harris were intended to reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions." Fields, supra, 125 F.3d at 763-64.

Based on In re Clark and In re Harris, the Ninth Circuit thus correctly, and unremarkably, concluded that the Dixon rule was not adequate to bar federal review. Id. Calderon contends that the admissions made in In re Clark and In re Harris "are virtually indistinguishable" from what occurred in McCleskey v. Zant, 499 U.S. 467 (1991). Calderon is wrong. In McCleskey, this Court was addressing "the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process." Id. at 496. Fields does not concern an abuse of the writ situation as this action comprises Fields's first attempt to obtain federal review of his conviction and death sentence. Moreover, in McCleskey, this Court was, in its own words, simply attempting "to define the doctrine of abuse of the writ with more precision." Id. at 489. This Court was not addressing or concerned with the inconsistent application of a state procedural rule.

The Ninth Circuit further stated that the In re Clark and In re Harris decisions "do not answer the question of exactly when the Dixon rule and other rules had become irregular and inconsistently applied." Fields, supra, 125 F.3d at 764 (emphasis in orig). Because "Fields did not provide . . . a survey of cases to demonstrate the inconsistent application of the Dixon rule in 1981" the Ninth Circuit conducted its own survey. Id. As

above noted, however, Fields, while not proffering "a survey of cases," did cite **four cases** decided between 1967 and 1976 in which the California Supreme Court acknowledged the discretionary nature of the Dixon rule in California. These cases, along with the 1993 In re Clark and In re Harris opinions, do demonstrate the inadequacy of the Dixon rule as of the pertinent time. Indeed, Fields also relied on myriad federal cases which cited all or some of these California cases in concluding that California has not consistently applied its procedural default rules. E.g., Siripongs v. Calderon, supra, 35 F.3d at 1318 (holding, based on In re Clark, that California's rule against successive habeas petitions was not adequate and independent as of 1991 to bar federal review); Morales v. Calderon, supra, 85 F.3d at 1393 (holding, based on In re Clark, that California's habeas timeliness rules were not adequate and independent at any time between 1989 and 1992); Hayes, supra, 103 F.3d at 75 (holding that district court did not err in concluding that the Dixon rule was not consistently applied prior to In re Harris); Karis v. Vasquez, 828 F.Supp. 1449, 1467-68 (E.D. Cal. 1993) (stating that California decisions such as In re Wallace, supra, In re Black, supra, In re Coughlin, supra, and In re Antazo, supra, "have repeatedly held that [the Dixon rule] is merely a discretionary policy" and thus finding the rule not adequate to bar federal review); Odle v. Calderon, 884 F.Supp. 1404, 1413-14 (N.D. Cal. 1995) (concluding based on California Supreme Court decisions acknowledging the Dixon rule to be a discretionary policy that the Dixon rule was not adequate as of 1988 direct appeal to bar federal review).

The Ninth Circuit survey was thus not necessary. It does, however, provide even more support for the conclusion that the Dixon rule was not adequate at the time in question.

Calderon contends that the Ninth Circuit did not explain its methodology in conducting the survey of cases. Petn. at 5. In fact, the Ninth Circuit clearly set forth that methodology. The court noted that during the 1973-81 time period, "habeas petitions were initially filed in California Superior Court with rights of appeal to both the California Court of Appeal and the California Supreme Court. Therefore, published decisions from both of California's appellate courts are instructive as to how the Dixon rule was being applied." Fields, supra, 125 F.3d at 764. The Ninth Circuit further explained that it "eliminated the cases that cited the Dixon rule, but did not actually involve the possibility of the rule's application," and that it was "left with nine cases." Id.

The Ninth Circuit then analyzed those nine cases (not one of which Calderon cites in the Petition). As the Ninth Circuit explained, of the nine cases in which the Dixon rule could have been applied, only two cases actually applied the Dixon rule. Id. In the other cases, the rule was **not** applied to block consideration of claims. Id. Of the four applicable California Supreme Court cases, only one invoked the procedural rule to default claims, whereas three did not. Id.

Contrary to Calderon's suggestion, the Ninth Circuit did not simply mechanically "tote up" these cases. Petn. at 23. Instead, it determined if these cases reflected whether the California courts were consistently applying the Dixon rule and also analyzed the language of these cases to see what the California courts were saying about the Dixon rule in published decisions intended to set precedent. As the Ninth Circuit noted, the case of In re Fuller, 124 Cal. App. 3d 251, 177 Cal. Rptr. 233 (1981), "perhaps best represents the lack of

guidance the Dixon rule was providing by 1981." Fields, supra, 125 F.3d at 764. The Ninth Circuit noted that in Fuller the California court stated:

> "We shall determine the case on the merits. It is true that as a general rule habeas corpus cannot serve as a substitute for appeal. [Citing to In re Dixon, supra.] The rule yields, however, in special circumstances; courts do not always require the exhaustion of appellate remedies. [Citing to, inter alia, In re Black, supra.] Here, as in In re Black, supra, petitioner's continued confinement followed 'somewhat unique' developments and the issue he presents is jurisdictional. It is also apparently novel. We are thus disposed to consider it." Id. at 764, citing to In re Fuller, supra, 124 Cal. App. 3d at 254-55.[9]

The Ninth Circuit also quoted language from In re Duran, 38 Cal. App. 3d 632, 635, 113 Cal. Rptr. 442 (1974), in which the court noted that it "has discretion to issue the writ if it believes an appeal in not adequate, or if a prompt disposition is required in the interests of justice. [Citations omitted.]"[10]

Thus, the Ninth Circuit survey also demonstrates the inadequacy of the Dixon rule. Calderon does not even try to analyze the cases relied upon by the Ninth Circuit. Instead, he attacks the survey itself. For example, he suggests that the Ninth Circuit should not have undertaken the "independent survey" because the burden of proof purportedly is on Fields to establish the inadequacy of the Dixon rule. Petn. at 22. This contention is wrong.

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[9] The habeas challenge in Fuller was to an order committing the defendant to a state hospital. The California Court of Appeal considered the developing law on such confinement and the purported novelty of the legal issue to be sufficient enough to disregard the Dixon rule. Fuller, supra, 124 Cal. App. 3d at 252-55.

[10] In Duran, the petitioner had filed both an appeal and the habeas petition challenging an order revoking his probation. Id. at 635. The court felt that "the interests of justice" warranted intervention on habeas even though the appeal was pending and notwithstanding the Dixon rule. Id.

Procedural default is an affirmative defense. As such, the burden of proof is on Calderon to establish the adequacy of the state procedural default rule before claims may be barred. Karis v. Vasquez, supra, 828 F.Supp. at 1463 n. 21 ("procedural default is an affirmative defense which may be waived. [Citations omitted.] Moreover, it is respondents who seek a dismissal, and ordinarily under such circumstances the burden rests with the proponent of the defense and of the motion. [Citation omitted.]"); Johnson v. Mississippi, supra, 486 U.S. at 587 (state court's conclusion that claim was barred because it was not raised on appeal could not stand where there was "no evidence that the procedural bar relied on by [the state court] has been consistently or regularly applied"); 1a Moore's Fed. Prac., ¶ 0.314 at. p. 3148 (1991) ("affirmative defenses inferentially carried the burden of proof"); Ocean Accident & Guaranty Corp. v. Rubin, 73 F.2d 157 (9th Cir. 1934) (burden of proving affirmative defense rests upon defendant). Second, as above shown, Fields in any event established the inadequacy of the Dixon rule. Finally, Calderon does not and cannot cite any authority for the proposition that a federal court cannot, in deciding whether a state procedural rule is adequate, survey cases decided by that state, regardless of who has the burden of proof. In fact, there is clear precedent from this Court that the federal courts can do so. E.g., Johnson v. Mississippi, supra, 486 U.S. at 587-90 (this Court reviewed state cases to determine adequacy of state procedural bar); Williams v. State of Georgia, supra, 349 U.S. at 384-89 (this Court surveyed state cases to see if state procedural rule was consistently applied).

Calderon also contends that the Ninth Circuit should not have looked to California Court of Appeal decisions. Petn. at 5, 23. Calderon cites no authority to support this contention and indeed it seems quite appropriate to review all relevant published

decisions to determine if the state courts are in fact consistently applying a procedural default rule. Moreover, as above noted, three of the four California **Supreme Court** cases cited by the Ninth Circuit could have applied the Dixon rule but did not. Fields, supra, 125 F.3d at 764.

Calderon then complains that the Ninth Court survey was underinclusive in that it was limited to the time period of 1973-81. Petn. at 23. This contention is misleading. First, the Ninth Circuit had the benefit of the two seminal 1993 decisions (In re Clark and In re Harris) in which the California Supreme Court acknowledged that, at least by that time, California's procedural rules were not being consistently applied. The Ninth Circuit also had before it the cases cited by Fields, decided between 1967 and 1976, in which the California Supreme Court repeatedly stated that the Dixon rule is "merely a discretionary policy" and did not consistently apply the rule. Moreover, Calderon does not set forth a more appropriate time frame for the analysis, other than to suggest that the analysis should have started with cases decided back in 1953, when In re Dixon was decided. Petn. at 23. Cases decided prior to 1967 are not relevant, however, even **if** it could be shown that the courts in California were consistently applying Dixon then, because at least by 1967 and through the time of Fields's appeal in 1981, the Dixon rule was repeatedly acknowledged by the California courts as being merely a discretionary policy and was not being consistently applied.

Calderon next contends the Ninth Circuit erred by omitting from its analysis the summary orders often issued in California habeas cases (known as postcard denials). Petn. at 23. Those opinions are not precedent, however, and cannot be cited or relied upon. Second, the postcard denials create confusion for the federal courts attempting to decipher the

basis for the denial. Siripongs, supra, 35 F.3d at 1317; Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992), cert. den., 510 U.S. 887 (1993); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (discussing California Supreme Court postcard denial, this Court observed that "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent"). Indeed, it would be extremely difficult to decipher from the postcard denials (1) when Dixon could have been applied in a particular case and (2) whether it was applied in a particular case. For example, even in the instant case the postcard denial issued by the California Supreme Court is ambiguous because it does not state which specific claims are being defaulted under the Dixon rule, and which specific claims are being defaulted under California's rule against successive habeas petitions (which latter rule, under Siripongs v. Calderon, supra, was held not to be adequate and independent to bar federal review).[11] Finally, it was not necessary for the Ninth Circuit to review the postcard denials which have been issued by the California Supreme Court when the California Supreme Court in **published decisions intended to set precedent** repeatedly stated that the Dixon rule is a discretionary policy and did not consistently apply the rule. Indeed, Calderon himself contends that "an evaluation of consistency should be more than just a mechanical toting-up

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[11] The order is thus insufficient to bar federal review for this additional reason. For example, in Bean, supra, 96 F.3d at 1131, the Ninth Circuit reviewed a California Supreme Court order procedurally defaulting 39 habeas claims. That order, as the order in Fields, did not specify which of the 39 claims were defaulted under Dixon and which were defaulted under another rule previously held insufficient to bar federal review. The Ninth Circuit thus held that the order was ambiguous and not sufficient to preclude federal review. Id. The Ninth Circuit in Fields, based on its conclusion regarding the Dixon rule, did not need to analyze the issue of ambiguity in this case. Fields, supra, 35 F.3d at 760 n.3.

of state cases" (Petn. at 23) which contradicts his assertion that postcard denials—which contain no discussion or analysis—should have been included in the survey.

Calderon finally complains that the survey was undertaken with no notice to him, and without his having a chance to brief the issue. Petn. at 12. This argument lacks merit. First, Fields set forth in his appellate brief **six** California cases decided between 1967 and 1993 in which the California Supreme Court acknowledged that the Dixon rule was discretionary and inconsistently applied. Calderon had more than an ample opportunity to try to analyze these cases or any other California cases that were not cited by Fields, but he chose not to do so. Instead he argued (as he does in the Petition) that the correct time for evaluation was 1994. He should not complain now that a review of other cases in fact provides additional support for Fields's position. Indeed, Calderon in the Petition now fails even to address the cases in the Ninth Circuit survey.

In sum, the California Supreme Court, in a long line of cases decided before and after 1981, has repeatedly acknowledged the discretionary and amorphous nature of the Dixon rule and its inconsistent application. The Ninth Circuit survey was proper, albeit unnecessary, and only provides further proof of these facts and the inadequacy of the Dixon rule as of 1981.

D. Calderon's Remaining Contentions Are Without Merit

Calderon's remaining contentions are without merit and essentially amount to pleas to this Court to rewrite the law pertaining to procedural default. For example, Calderon:

> "submits that a petitioner should bear the burden of making a prima facie case of prejudicial inconsistency or discriminatory invocation of the rules.

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

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Calderon also contends the Ninth Circuit should have been more "deferential" to the California court. Petn. at 9-11, 19-21. For example, Calderon states that the "facts on which Fields's allegations rest are now two decades old, and the State's ability to defend has been severely prejudiced. The Ninth Circuit gave no apparent consideration to this legitimate state interest." Petn. at 11. The law, however, mandates that federal review of a federal claim cannot be barred unless the state procedural default rule is adequate. This simple test does not encompass weighing the age of the case or any purported countervailing state interests.[13] Moreover, there is no evidence that the Ninth Circuit was not being "deferential," and, finally, the cases cited by Calderon in support of his "deference" argument are either not pertinent and/or in fact demonstrate that the Fields decision was correct and properly reasoned. E.g., Coleman v. Thompson, supra, 501 U.S. at 750-51 (federal review of claims defaulted by "an independent and adequate state procedural rule" is barred unless the petitioner can show cause for the default and prejudice arising therefrom or a fundamental miscarriage of justice and noting that by "applying the cause and prejudice standard" [not at issue herein] consistency of

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[12](...continued)
assignment of shares of a corporation to African Americans and held that plaintiffs' failure to comply with a state procedural rule regarding appeal—which resulted in state court twice dismissing the appeal—did "not bar" federal review because the state rule was not "so consistently applied" and is "more properly deemed discretionary"); Williams v. State of Georgia, supra, 349 U.S. at 389 ("discretionary" state procedural rule not adequate to bar federal); Jimmy Swaggart Ministries v. Bd. of Equal., 493 U.S. 378, 397-99 (1990) (claim barred where appellant did not comply with state law requiring exhaustion of administrative remedies and state did not apply exceptions to that rule "in an irregular, arbitrary, or inconsistent manner").

[13] It is Fields, who sits daily on death row and seeks to overturn his conviction and/or death penalty, who is prejudiced by delay. For example, he has asserted claims of egregious juror misconduct but already some of the jurors who could have testified in support of the claims have passed away while memories of others may be fading.

review of federal procedural rules and state procedural rules occurs); Brown v. Allen, 344 U.S. 443, 458 (1953) (if state action is based on "an adequate ground," federal review may not be required); Reed v. Farley, 512 U.S. 339, 342-49 (1994) (state court's failure to observe speedy trial provision did not give rise to cognizable habeas claim where record showed that delays were attributable to defendant, and that he did not object to the trial date when it was set or suffer prejudice from the slight delay).

CONCLUSION

Fields failed to raise claims on appeal in 1981 and thus under the law as set forth by this Court the adequacy of the Dixon rule must be determined as of that time. The California courts, in numerous cases decided prior to 1981 and thereafter, repeatedly stated that the Dixon rule is discretionary and did not consistently apply the rule. As such, the Ninth Circuit correctly held that the Dixon rule is not adequate to bar federal review of the claims Fields did not raise on appeal in 1981. Fields thus respectfully submits that there is no reason for this Court to invoke its certiorari jurisdiction and asks that this Court deny the Petition.

Dated: April 9, 1998

Respectfully Submitted,

CARLSMITH BALL

By: _____

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Stevie Lamar Fields

NO. 97-1262

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON, Petitioner,

v.

STEVIE LAMAR FIELDS, Respondent.

CERTIFICATE OF SERVICE

I, David S. Olson, a member of the United States Supreme Court Bar, hereby certify that I served one copy of the **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on all parties required to be served.

Service was made on counsel for petitioner by depositing on April 9, 1998, the above-referenced documents in the United States mail, with first-class postage prepaid, addressed as follows:

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NO. 97-1262

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON,

Petitioner,

v.

STEVIE LAMAR FIELDS,

Respondent.

RESPONSE OF RESPONDENT TO BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Statutes and Rules

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1. **The Amicus Brief is Largely Repetitive of the Petition**

Rule 37 of the Rules of the United States Supreme Court provides that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." The instant *amicus* brief violates Rule 37 in that the contentions made in that brief are largely repetitive of arguments made in the Petition for Writ of Certiorari ("Petition"). For example, the Criminal Justice Legal Foundation (the "Foundation") argues, as did Calderon in the Petition, "that the determination of adequacy primarily depends on the petitioner receiving fair notice of the state procedural rule's existence." *Amicus* Brief at 5, cf. Petition at 14 (Dixon was decided in 1985 and thus Fields had "sufficient notice of the rule in 1981"). The Foundation argues, as did Calderon, that because California's Dixon rule has been in existence since 1953, it should therefore be deemed adequate to bar federal review of claims defaulted thereunder. *Amicus* Brief at 9; cf. Petition at 13-15, 22-26. The Foundation argues, as did Calderon, that the decision in Fields v. Calderon, 125 F.3d 757 (9th Cir. 1997), follows "a string of erroneously decided cases" including Morales v. Calderon, 85 F. 3d 1387 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 500 (1996); Calderon v. U.S. District Court (Hayes), 103 F. 3d 72 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 2532 (1997); and Calderon v. U.S. District Court (Bean), 96 F. 3d 1126 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1569. *Amicus* Brief at 10, cf. Petition at 7-11. Like Calderon, the Foundation ignores that this Court declined to exercise its certiorari jurisdiction to review any of those "erroneously decided cases."

Like Calderon, the Foundation repeatedly criticizes the Ninth Circuit for what it perceives to be its "unforgiving application of adequacy" (*Amicus* Brief at 8), while at the same time acknowledging that the Ninth Circuit, in the Fields decision, was simply relying on precedent as set forth by this Court. Id. at 8-10. Indeed, the Foundation, like Calderon, criticizes the Ninth Circuit decision and its analysis of pertinent California cases without even discussing those or any other California cases. Under Calderon's and the Foundation's view, state cases holding that a state procedural rule is discretionary and failing to apply it regularly apparently are irrelevant to the question of the adequacy of such a rule, as is a seminal California Supreme Court case conceding that its procedural default rules were "subject to undefined exceptions." In re Clark, 5 Cal. 4th 750, 768, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993). Such view, of course, does not comport with well-established procedural default law as laid down by this Court and highlights that, in fact, the Foundation, like Calderon, is really urging that this Court disregard the longstanding "regularly and consistently applied" test for determining the adequacy of a state procedural rule and substitute one based on "notice."

Indeed, the *amicus* brief, like the Petition itself, is ultimately little more than a request that this Court dramatically change the tests that presently govern the determination of the adequacy of a state procedural default rule. Thus, the Foundation's attempts to characterize the Ninth Circuit's decision in this case as intrusive oversight that fails to respect California's proper application of its procedural default rules (*Amicus* Brief at 1, 18) is unfair because, in reality, the Ninth Circuit has merely noted that the California Supreme Court itself freely acknowledged in In Re Clark, supra, 5 Cal. 4th at 768, that California's habeas corpus procedural default rules were "subject to undefined exceptions" that provide no clear guidance

of when departure from the rule is warranted. The issue thus is not, as the Foundation suggests, whether an occasional act of grace is permissible, but whether California's Dixon rule had been regularly and consistently applied as of 1981. As the Ninth Circuit stated on this question, "[t]he California Supreme Court could hardly have stated more clearly that the application of its procedural rules governing habeas petitions had become irregular and inconsistent. The opinions in In Re Clark [supra] and in In Re Harris [5 Cal. 4th 813, 21 Cal. Rptr. 2d 373, 855 P.2d 391 (1993)] were intended to reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions." Fields v. Calderon, supra, at 125 F.3d at 763-64. The Ninth Circuit analysis of other California cases—ignored by the Foundation—further confirmed that the Dixon rule was not regularly applied at the time of Fields's appeal in 1981, prior to the decisions in In Re Clark and in In Re Harris intended to reverse such inconsistent state practices.

2. There is No Conflict in the Circuits

In an attempt to find a reason for this Court to exercise its certiorari jurisdiction, the Foundation suggests that there is a split among the Circuit Courts of Appeals "in applying the adequacy bar." *Amicus* Brief at 13. Of course, the Ninth Circuit is the only Circuit Court that has reviewed or can review the adequacy of California's Dixon rule. No "split" does or can exist on the question of that particular rule's adequacy.

The Foundation, however, states that "the Ninth Circuit has created a presumption of irregularity [in evaluating procedural default rules], inverting the usual rule" thereby causing a purported conflict when compared to how other Circuit Courts evaluate other procedural default rules. *Amicus* Brief at 18. This statement is inaccurate. As

summarized above and set forth in the original opposition brief filed by Fields, the Ninth Circuit followed seminal cases from this Court in conducting its analysis of the adequacy of the Dixon rule and thus concluding that the critical inquiry was whether the Dixon rule had been regularly followed and consistently applied, including Coleman v. Thompson, 501 U.S. 722 (1991), Ford v. Georgia, 498 U.S. 411 (1991), and Johnson v. Mississippi, 486 U.S. 578 (1988).[1]

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[1] In Ford v. Georgia, supra 498 U.S. at 423-25, this Court reiterated that "only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim" (citations omitted); in Coleman v. Thompson, supra 501 U.S. at 729, this Court reiterated that state court decisions regarding federal law will not be reviewed by the federal courts if the state law ground is adequate and independent; and in Johnson v. Mississippi, supra 486 U.S. at 587, this Court reiterated that a state procedural rule is not adequate unless the rule is "strictly or regularly followed" or "consistently or regularly applied" (citations omitted). By contrast, the cases upon which the Foundation relies are either not pertinent, or do not support its contention that the longstanding test for adequacy should be disregarded. E.g., Reich v. Collins, 513 U.S. 106 (1994) (this Court reviewed a state tax refund statute to see if it complied with long established law that required a clear and certain remedy for taxes collected in violation of federal law); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) ("we have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review" (citations omitted)); Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989) (state procedural rule is adequate where it is applied "in the vast majority of cases"). NAACP v. State of Alabama, 357 U.S. 449, 455-57 (1958) (in determining whether a procedural default rule "independently and adequately supports the judgment," this court stated that "a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence"); Staub v. City of Baxley, 355 U.S. 313, 318-20 (1958) (decision by state court that appellant lacks standing to attack the constitutionality of an ordinance and that appellant's failure to attack specific sections of the ordinance rendered it unnecessary, under state procedure, to pass upon the constitutionality of the ordinance, was not adequate to bar federal review of the challenged ordinance, this Court noting that "whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice") (citations omitted)).

Moreover, in stark contrast to the contention that the Ninth Circuit is rigidly analyzing state procedural default rules or presuming them to be invalid, the Ninth Circuit plainly reiterated in the Fields opinion its view "that procedural rules need not be utterly mechanical. That the application of a rule requires the exercise of judicial discretion does **not** render the rule inadequate to support a state decision," so long as the standards governing the exercise of such discretion are clear. Fields v. Calderon, supra, 125 F. 3d at 762, citing Morales v. Calderon, supra, 85 F. 3d at 1392 (emphasis added).[2]

Thus, the entire premise for the Foundation's contention that there is a split in the Circuit Courts fails, as the Ninth Circuit is the only court that can evaluate the adequacy of the Dixon rule and, like the other Circuit Courts, is applying the same well-established law to determine procedural bar issues. An analysis of the cases relied upon by the Foundation in an attempt to support its conflict argument shows that there is no split in the Circuits and thus no need for this Court to exercise its certiorari jurisdiction.

For example, in Amos v. Scott, 61 F.3d 333 (5th Cir. 1995), cert. den., 516 1005 (1995), the Fifth Circuit noted that a "federal court will not review a question of federal law decided by a state court if the decision of that state court rests on a state ground that is both independent of the merits of the federal claim and adequate to support the judgment." Id. at 338. The Fifth Circuit stated that "the test for the adequacy of such a rule is that it is

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[2] The Dixon rule, however, is subject to "undefined exceptions" as acknowledged by the California Supreme Court in In Re Clark, supra, 5 Cal. 4th at 768, and thus standards governing the California court's exercise of discretion never emerged. Among other things, the rule only applies "in the absence of special circumstances" (In Re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953)), and the California Supreme Court has never explained, clarified, or limited what those exceptions might be. In Re Clark, supra, 5 Cal. 4th 750, 768 n. 8.

strictly or regularly followed by the cognizant state court. [Citations omitted.] The Supreme Court has further defined this concept of adequacy, however, to include a state procedural ground that is strictly or regularly applied *evenhandedly to the vast majority of similar claims*. [Citations omitted.]" Id. at 339 (emphasis in original). In Amos v. Scott, the court also noted that the federal courts presume there is no adequate state ground for a state court decision unless the same is "clear from the face of the opinion." Id. (Citations omitted.)

The court then analyzed the specific rule at issue in that case which was Texas's contemporaneous objection rule. The court found that Texas had "strictly and regularly" applied both the general rule itself and the exceptions thereto "in the vast majority of cases." Id. at 340-44. The court also found fault with the petitioner's analysis, noting that in a substantial majority of cases on which he relied the state court did **not** fail to follow the rule but, in fact, the cases reflected instances where "the state court first held that a defendant's claims were procedurally barred and then addressed the merits of the defaulted claim in an alternative holding." Id. at 341.

In contrast to how the California courts repeatedly described its own Dixon rule, the Amos court further noted that, based on its review of Texas decisions, the Texas rule was not "discretionary" and was applied "evenhandedly." Id. at 340-45.

The Amos court summarized its holding with respect to the adequacy of the rule at question as follows:

> "In sum, we conclude that the [Texas court] strictly and regularly applies its contemporaneous objection rule and the recognized exceptions thereto in the vast majority of cases . . .

> that come before it . . . . We hold, therefore, that the Texas contemporaneous objection rule . . . . is an independent and adequate state-law procedural ground sufficient to bar federal court habeas review of federal claims." Id. at 345.

The fundamental analysis employed in Amos v. Scott is virtually identical to the analysis employed by the Ninth Circuit on the question of the adequacy of California's Dixon rule. In Amos, however, the Texas courts strictly and regularly followed their rule and the clearly defined the limited exceptions thereto. By contrast, the Ninth Circuit, applying the same law as the court did in Amos, correctly found the Dixon rule to be inadequate because the California courts themselves repeatedly referred to the Dixon rule as discretionary, failed to consistently apply it, and noted that it was "subject to undefined exceptions."

The other cases upon which the Foundation relies are similarly unavailing. E.g., Duvall v. Purkett, 15 F.3d 745 (8th Cir. 1994), cert. den., 512 U.S. 1241 (1994) (in a case in which the defendant did not appeal or seek post-conviction relief in the state courts, a procedural default for failure to exhaust his claims could not be deemed to be "arbitrarily enforced" and thus inadequate to bar federal review); Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990) ("a state ground is 'adequate' only if the state court acts in a consistent and principled way"); Banks v. Horn, 126 F.3d 206, 211-13 (3rd Cir. 1997) (after noting that "in order to prevent federal habeas corpus review, a state procedural rule must be 'consistently or regularly applied,'" [citations omitted] the Third Circuit concluded that the district court erred in finding certain unexhausted claims procedurally barred because a review of state cases "demonstrate that the Pennsylvania Supreme Court does not apply the Pennsylvania